

No. 10404

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

*Vol*

— *2347*

UNITED STATES OF AMERICA,  
Appellant,  
vs.

PHILIP GREY SMITH, as Administrator with  
will annexed of the Estate of Olive Wills Wig-  
more, Deceased, and J. A. WIGMORE,  
Appellees.

Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

**FILED**

MAY 25 1943

PAUL P. O'BRIEN,  
CLERK



## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

LEO V. SILVERSTEIN,  
United States Attorney,

E. H. MITCHELL,  
Asst. U. S. Attorney,

EUGENE HARPOLE,  
Special Attorney, Bureau of Internal  
Revenue, 600 U. S. Post Office & Court  
House Bldg., Los Angeles, Calif.

For Appellees:

CLYDE R. BURR,  
310 Security Title Insurance Building  
530 West Sixth St.  
Los Angeles, Calif. [1\*]

In the District Court of the United States in  
and for the Southern District of California

No. 2499-B.H.

UNITED STATES OF AMERICA,

a corporate body politic,

Plaintiff,

vs.

THE ESTATE OF OLIVE WILLS WIG-  
MORE, Deceased; PHILIP GREY SMITH,  
as Administrator with will annexed of the  
ESTATE OF OLIVE WILLS WIGMORE,  
Deceased, and J. A. WIGMORE,

Defendants.

## COMPLAINT

### COMPLAINT FOR RECOVERY OF INCOME TAXES

Plaintiff complains of the defendants and alleges:

#### I.

That the plaintiff is a corporate and sovereign body  
politic.

#### II.

That Plaintiff alleges upon information and belief  
that the defendants, J. A. Wigmore and Philip Grey  
Smith, as Administrator with the will annexed of  
the Estate of Olive Wills Wigmore are now and at  
all times herein mentioned have been [2] residents  
of the State of California, and within this judicial  
District.

III.

That Olive Wills Wigmore died on March 1, 1941, a resident of the City of Pasadena, County of Los Angeles, State of California. That letters of administration of her estate were issued by the Probate Division of the Superior Court of the State of California in and for the County of Los Angeles in the probate proceeding entitled In the Matter of the Estate of Olive Wills Wigmore, Deceased, Number 203,316.

IV.

That the defendant, Philip Grey Smith, is the duly appointed, qualified and acting Administrator with will annexed of the Estate of Olive Wills Wigmore.

V.

That the decedent, Olive Wills Wigmore, and J. A. Wigmore filed a joint Federal income tax return for the taxable year 1933. That on the 16th day of October, 1936, the Commissioner of Internal Revenue, on his October 1936 number 3 assessment list, page 1, line 7, for the 18th Collection District of Ohio, assessed 1933 income taxes, together with interest thereon, against Olive Wills Wigmore and J. A. Wigmore, jointly in the aggregate amount of \$2,981.27. That notice and demand for the payment of said tax and interest thereon was issued to said taxpayers, Olive Wills Wigmore and J. A. Wigmore, by the Collector of Internal Revenue for the 18th Collection District of Ohio on October 22, 1936 and November 9, 1936. [3]

## VI.

That notwithstanding said notice and demand for payment the taxpayers, Olive Wills Wigmore and J. A. Wigmore and Philip Grey Smith, as administrator with the will annexed of the Estate of Olive Wills Wigmore, have wholly failed, neglected and refused to pay said 1933 income tax or the interest thereon or any part thereof and that the whole thereof is now unpaid.

## VII.

That on March 15, 1937, the Collector of Internal Revenue for the Sixth Collection District at Los Angeles recorded a notice of lien securing the payment of said 1933 income tax in the office of the County Recorder of Los Angeles County, California, and with the clerk of the United States District Court in and for the Southern District of California.

FOR A SECOND CAUSE OF ACTION  
PLAINTIFF ALLEGES

## I.

Plaintiff realleges and repeats the contents of Paragraphs I, II, III and IV above.

## II.

That on the 12th day of April, 1941, the Commissioner of Internal Revenue, on his March 1941 assessment list for the 18th Collection District of Ohio, Account #202878, assessed income taxes against Olive Wills Wigmore for the taxable year 1940 in the sum of \$2,321.89, of which tax there was paid the sum of \$580.48 on March 14, 1941, and that there now



remains unpaid of said tax a balance of \$1,741.41, together with interest thereon as provided by law. That notice and demand for the payment of said tax was issued to the taxpayer by the Collector of Internal Revenue at Los Angeles, California, on July 21, 1941.

[4]

### III.

Notwithstanding said notice and demand, the balance of said 1940 income tax in the sum of \$1,741.41 has not been paid, and that the whole of said balance, together with interest thereon as provided by law, remains assessed and unpaid.

### IV.

That the commencement of this action is requested and sanctioned by the United States Commissioner of Internal Revenue and authorized by the Attorney General of the United States.

Wherefore, Plaintiff prays for Judgment against the defendants as follows:

#### I.

For the sum of \$2,981.27, together with interest as provided by law, on account of the unpaid income taxes of Olive Wills Wigmore and J. A. Wigmore for the taxable year 1933.

#### II.

For the sum of \$1,741.41 against the defendants, Estate of Olive Wills Wigmore, Deceased, and Philip Grey Smith, as administrator with the will annexed of the Estate of Olive Wills Wigmore, Deceased, together with interest thereon as provided by law, on

account of the unpaid income taxes of Olive Wills Wigmore for the taxable year 1940.

III.

For Plaintiff's costs.

LEO V. SILVERSTEIN,  
United States Attorney.

E. M. MITCHELL,  
Asst. U. S. Attorney.

EUGENE HARPOLE,  
Special Attorney, Bureau of  
Internal Revenue.

By EUGENE HARPOLE,  
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 15, 1942. [5]

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[Title of District Court and Cause]

ANSWER OF PHILIP GREY SMITH, AS AD-  
MINISTRATOR WITH-WILL-ANNEXED  
OF THE ESTATE OF OLIVE WILLS  
WIGMORE, DECEASED, TO THE COM-  
PLAINT

Comes now Philip Grey Smith, as Administrator with-will-annexed of the Estate of Olive Wills Wigmore, deceased, and, for answer to the complaint herein, admits, denies and alleges as follows:

FIRST DEFENSE TO THE FIRST CAUSE  
OF ACTION:

I.

Said defendant admits the allegations contained

in paragraphs I, II, III and IV of said cause of action; alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph V of the first cause of action, except that said defendant admits that decedent, Olive Wills Wigmore, and J. A. Wigmore filed [6] a joint Federal income tax return for the taxable year 1933; alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph VI of the first cause of action; alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph VII of said cause of action.

SECOND DEFENSE TO THE FIRST CAUSE  
OF ACTION:

I.

That the said Olive Wills Wigmore, deceased, duly and regularly filed her income tax return for the taxable year 1933 on March 13, 1934, in the office of the Collector of Internal Revenue in Cleveland, Ohio. That no assessment in connection with any of the taxes of the said Olive Wills Wigmore for the said taxable year of 1933 was entered by the Commissioner of Internal Revenue prior to the 16th day of March, 1936.

THIRD DEFENSE TO THE FIRST CAUSE  
OF ACTION:

I.

The right of action set forth in the first cause

of action in the complaint did not accrue within six years next before the commencement of this action.

FIRST DEFENSE TO THE SECOND CAUSE  
OF ACTION:

I.

Defendant admits all of the allegations in paragraphs I, II and III of said cause of action.

II.

Said defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of said cause of action. [7]

Wherefore said defendant prays that plaintiff take nothing by this complaint herein; that said defendant have his costs herein and whatever other relief is proper.

CLYDE R. BURR,

Attorney for Philip Grey  
Smith, Administrator with-  
will-annexed of the Estate of  
Olive Wills Wigmore, De-  
ceased.

(Duly Verified.)

Received copy of the within Answer this 9th day  
of November, 1942.

EUGENE HARPOLE,

Attorney for Plaintiff.

[Endorsed]: Filed Nov. 9, 1942. [8]

2726  
INDIVIDUAL INCOME TAX RETURN.  
FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000  
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY  
For Calendar Year 1933

Not Write in These Spaces  
1556  
656397

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1934  
PRINT NAME AND ADDRESS PLAINLY BELOW  
J. A. Nigrore and Olive Wille Nigrore.  
(Name)  
(Street and Number, or Rural Route)  
Chesterland, George County Ohio  
Post Office  
1713

1. Are you a citizen or resident of the United States? ☒ Yes  
2. If you filed a return for 1932, to which Collector's office was it sent? ☒ Cleveland  
3. Is this a joint return of husband and wife? ☒ Yes  
4. State names of husband and wife if a separate return was made and the Collector's office to which it was sent ☒ Joint  
5. Were you married and living with husband or wife during your taxable year? ☒ Yes  
6. If not, were you during your taxable year supporting in your household one or more persons directly or indirectly? ☒ Yes  
7. How many dependent persons (other than husband or wife under 18 years of age or incapable of self-support) received (and could support from you during your taxable year)? ☒ 0  
8. If your estate is subject to question 1, 4, or 7 checked during the year, state date and nature of change  
9. Have a father or mother who are kept on food or medical basis? ☒ Yes  
10. If you are a partner in a partnership, state name, address, and kind of business  
11. If you are a partner in a partnership, state name, address, and kind of business  
12. If you are a partner in a partnership, state name, address, and kind of business  
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99. If you are a partner in a partnership, state name, address, and kind of business  
100. If you are a partner in a partnership, state name, address, and kind of business

INCOME  
1. Salaries, Wages, Commissions, Fees, etc. (State name and address of employer)  
J. A. Nigrore Land Company, 1,000.00  
J. A. Nigrore Company, 3,000.00  
1877 Euclid Realty Company (Commission) 500.00  
2. Income (or Loss) from Business or Profession. (From Schedule A)  
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)  
4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source  
5. Income (or Loss) from Partnerships, Syndicates, Pools, etc. (State name, address, and kind of business)  
6. Income from Fiduciaries. (State name and address)  
7. Bonds and Royalties. (From Schedule B)  
8. (a) Profit from Sale of Stocks and Bonds held two years or less. (From Schedule C-10)  
(b) Profit or Loss from Sale of Other Assets held two years or less. (From Schedule C-10)  
(c) Profit or Loss from Sale of Capital Assets (if not reported as item 30) (From Schedule C-10)  
9. Taxable Interest on Liberty Bonds, etc. (From Schedule D)  
10. Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of 1932 Act 1,306.64  
(b) Domestic Corporations not subject to taxation under Title I of 1932 Act  
(c) Foreign Corporations  
11. Other Income. (State name) (For separate schedule, if necessary) (See schedule) 22,686.12  
12. TOTAL INCOME IN ITEMS 1 TO 11 29,533.11

DEDUCTIONS  
13. Interest Paid 3,613.85  
14. Taxes Paid. (Explain in Schedule E)  
15. Losses by Fire, Storm, etc. (Explain in Table at end of page 2)  
16. Bad Debts. (Explain in Schedule F)  
17. Contributions. (Explain in Schedule F)  
18. Other Deductions Authorized by Law (Explain in Schedule F) See schedule 22,451.55  
19. TOTAL DEDUCTIONS IN ITEMS 13 TO 18 37,069.40  
20. NET INCOME (Item 12 minus Item 19) 7,576.09

COMPUTATION OF TAX (See Instruction 23)  
21. Net Income Subject to Tax (Item 19 above) 7,576.09  
22. Less: Interest on Liberty Bonds, etc. (Item 10)  
23. Dividends from (a) 1,306.64  
24. Personal Exemption 2,500.00  
25. Credit for Dependents  
26. Total of Items 22 to 25 5,806.64  
27. Balance subject to Normal Tax (Item 21 minus Item 26) 1,769.45  
28. Amount taxable at 6% and over (Item 27)  
29. Amount taxable at 6% (Item 27)  
30. Amount of Capital Net Tax (at 1% of 28 reported on Item 29)  
31. Normal Tax  
32. Normal Tax  
33. Surplus (Item 31)  
34. Tax on Net Income (Item 31)  
35. Adjustment for Capital Gains or Losses (Item 31)  
36. Total Tax (Item 34 plus Item 35)  
37. Less: Income Tax Paid at Source (Item 36)  
38. Income Tax Paid at Source (Item 36)  
39. Balance of Tax (Item 36 minus Item 37)  
40. Balance of Tax (Item 36 minus Item 37)

AFFIDAVIT  
I swear that the return, including the accompanying schedule and statement, has been examined by me, and to the best of my knowledge and belief is a true and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1932 and the National Industrial Recovery Act and the Regulations issued thereunder.  
(See Instruction 27)  
Return to and subscribed before me this 21 day of December, 1934  
Notary Public  
An amended return must be marked "Amended" at top of return. Checks and drafts will be accepted only if payable to payee.  
10





Form 979  
TREASURY DEPARTMENT  
Internal Revenue Service  
(Revised July 1936)

ORIGINAL

**CONSENT FIXING PERIOD OF EXTENSION UPON RECEIPT OF  
ASSESSMENT OF INCOME AND PROFITS TAX**

BUREAU OF  
INTERNAL REVENUE

1936 FEB 3 AM 11 42

JAN 18 1936

REVENUE AGENCY

Cleveland, Ohio, January 17, 1936

In pursuance of the provisions of existing Internal Revenue Laws

J. A. Wigmore, a taxpayer

(or taxpayers) of Chastarland, Geauga County, Ohio, and  
the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes  
due under any return (or returns) made by or on behalf of the above-named

taxpayer (or taxpayers) for the taxable year (or years) 1935,  
under existing acts, or under prior revenue acts, may be assessed at any  
time on or before June 30, 1937, except that, if a notice of a deficiency  
in tax is sent to said taxpayer (or taxpayers) by registered mail on or  
before said date, then the time for making any assessment as aforesaid  
shall be extended beyond the said date by the number of days during which  
the Commissioner is prohibited from making an assessment and for sixty  
days thereafter.

J. A. Wigmore  
Taxpayer.  
Wm. O. Thompson  
Taxpayer.

[SEAL\*\*]

By \_\_\_\_\_

Guy I. Blossing  
Commissioner of Internal Revenue

By E. E. 66 January 31, 1936  
(Date)

\*If this consent is executed with respect to a year for which a joint return of a  
husband and wife was filed, it must be signed by both spouses, except that one spouse  
may sign as the agent for the other. Whenever a consent is executed by an agent, such  
action must be specifically authorized by a power of attorney, which, if not previously  
filed, must accompany the consent.

\*\*If this consent is executed on behalf of a corporation, it shall be signed with the  
corporate name, followed by the signature and title of such officer or officers of the  
corporation as are empowered under the laws of the State in which the corporation is  
located to sign for the corporation, in addition to which the seal of the corporation  
must be affixed. Where the corporation has no seal, the consent must be accompanied  
by a certified copy of the resolution passed by the board of directors, giving the  
officer authority to sign the consent

U. S. GOVERNMENT PRINTING OFFICE 2-12720

45

[Endorsement]: Filed Dec. 21, 1942





# PLAINTIFF'S EXHIBIT No. 3

Form 23C-1

Treasury Department

Internal Revenue Service

Form approved by Comptroller General U. S.,

Aug. 21, 1928

## Assessment Certificate Commissioner's Assessment List

18th District of Ohio

Month—October #3

Year—1936

Additional Assessments made by Commissioner:.....Personal .....\$19592.05

.....Corporation .....\$ 557.83

Total Assessments .....\$20149.88

I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C.

Office of Commissioner of Internal Revenue, October 16, 1936.

CHAS. T. RUSSELL,  
Commissioner of Internal Revenue.

[Endorsed with illegible initials.]

[17]

Page No. 1

District—1 Ohio		Income Tax		, List		October #3 1936		Page No. 1	
		(Classification.)							
		Old Balance	Date	Debit	Credit	New Balance	Remarks		
J. A. Wigmore & Mrs. Olive				2580.82		2981.27	1933 656397		
Wills Wigmore				400.45			272C WVR RAR		
Husband and Wife							OL 7-9-36		
956 S Orange Grove Ave									
Pasadena Calif									
Oct 17 P#3									

[Endorsed]: Filed Dec. 21, 1942.

[18]

[Title of District Court and Cause.]

### OPINION

In this action the government seeks to recover income taxes for the years 1933 and 1940, from the Estate of Olive Wills Wigmore. The Administrator with will annexed admits the liability of the estate for the year 1940 but alleges that the recovery for the year 1933 is [19] barred by the statute of limitations. The government contends that while the income tax was not assessed until 1936, the taxpayer, Olive Wills Wigmore, had executed a waiver the pertinent part of which is as follows:

“Consent Fixing Period of Limitations Upon  
Assessment of Income and Profit Tax.

Cleveland, Ohio, January 17, 1936.

“In pursuance of the provisions of existing Internal Revenue Laws J. A. Wigmore, a taxpayer (or taxpayers) of Chesterland, Coauga County, Ohio, and the Commissioner of Internal Revenue hereby *consent agree* as follows:

“That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year (or years) 1933 under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1937, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended be-

yond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

[Seal]

J. A. WIGMORE

Taxpayer

OLIVE W. WIGMORE

Taxpayer

By .....

GUY T. HELVERING

Commissioner of Internal  
Revenue

By A. C. C.—January 31, 1936

[20]

“If this consent is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other. \* \* \*”

The sole question for determination in this action is whether or not the Estate of Olive Wills Wigmore is bound by the above waiver. The administrator contends that inasmuch as Mrs. Wigmore is not named in the document she is not bound by the same, on the other hand, the government claims that as there was but one return filed in 1933 by the Wigmore, it was undoubtedly her intent in signing said waiver to be bound thereby.

The evidence discloses that a joint return was filed in the year 1933 by Mr. and Mrs. Wigmore and each signed the same.

While such waiver or consent is not a contract but

essentially a voluntary, unilateral waiver of a defense by the taxpayer, (*Florsheim Bros., etc. v. United States*, 280 U. S. 453) at the same time, I see no reason why the rules applicable to the construction of a contract should not apply to the construction and effect of a waiver, (*Stange v. U. S.* 282 U. S. 270 at page 275).

There appears to be a paucity of authorities dealing with the effect of an agreement signed by a party not named therein as a party, but in 6 R. C. L. page 875, I find the following language used:

“\* \* \* If a contract states distinctly that it is between two designated parties, the fact that another person’s name appears at the end of the contract with that of the parties does not make it his contract. \* \* \*”

Citing as authority for such statement the case of *Shriner v. Craft*, 166 Ala. 146, 51 So. 884, wherein the court made the following statement:

“The first assignments of error insisted on (numbered 1 and 2) are to the sustaining of the demurrer of Mary R. Shriner, on the ground that the complaint shows on its face that Mary R. Shriner was not a party to the contract sued on, and the third, fourth, and fifth assignments relate to the same subject, to wit, to the refusal of the [21] court to grant the motion for the discontinuance of the case, because of the amendment of the complaint, by striking out the name of said Mary R. Shriner.

“There was no error in either action of the

court. The contract sued on is set out in the complaint, and it states distinctly that it is between W. A. Shriner and John Craft. The fact that Mary R. Shriner's name appears at the end of the contract with W. A. Shriner does not make it her contract. \* \* \*

(See also 17 C.J.S. p. 803).

If the above rule is to prevail the estate of Mrs. Wigmore is not liable.

The only analogous federal case called to my attention is the case of *Commissioner v. Bryson*, 79 Fed. (2d) 397, wherein Judge Denman in his concurring opinion said:

"I concur in the decision. The body of the waiver produced by the Commissioner purports to be an agreement between the Bryson-Robinson Corporation and the Commissioner. It is on a printed form, furnished by the Commissioner, and the only insertions possibly to be attributed to the taxpayer to whom it is tendered are its name in the body of the instrument and the signature. It was not signed in the corporate name. The signer Bryson described himself to be a "former secretary". In an accompanying letter he disclaims authority to act for the corporation. The wording of document contains no agreement on the part of Bryson individually. (Underscoring supplied)

Whether the omission of the name of Mrs. Wigmore from the body of the waiver was due to care-

lessness, or the liability for taxes rested primarily upon the husband and originally there was no intention to bind the wife by said waiver or consent, (*Cole v. Commissioner*, 81 Fed. (2d) 485) is mere surmise.

In *Crowe v. Commissioner*, 86 Fed. (2d) 796, the following statement is made:

“\* \* \* It is clear that if respondent’s contention is correct, it must be by reason of implications arising from the language of the statute and not by any clear expression of the lawmakers. Under such circumstances, the doubt must be construed in favor of the taxpayer.” [22]

Judge Denman in *Ersine v. U. S.* 84 Fed. (2d) 690-1 said:

“Such revenue acts must be construed strictly in favor of the appellant sought to be charged as importer. He is ‘entitled to the benefit of even a doubt’. *Tariff Act 1897*, 30 Stat. 151; *United States v. Riggs*, 203 U. S. 136, 139, 27 S. Ct. 39, 40, 51 L. Ed. 127; *Hartranft v. Wiegmann*, 121 U. S. 609, 616, 7 S. Ct. 1240, 30 L. Ed. 1012; *Miller v. Standard Nut Margarine Co.* 284 U. S. 498, 508, 52 S. Ct. 260, 76 L. Ed. 422.”

(See also *Miller, Collector v. Standard Nut Margarine Co.* 284 U. S. 498-508 and *Commissioner v. Bryson*, 79 Fed. (2d) 397-403).

It appears to me that there is a serious doubt whether Mrs. Wigmore’s Estate is bound by said waiver, and under the foregoing authorities said doubt should be resolved in favor of her estate.

The burden is upon the plaintiff, by a preponder-



ance of the evidence, to establish that the statute of limitations has been waived. This the plaintiff has failed to do.

Plaintiff is entitled to judgment on its second cause of action as prayed for, but will take nothing on its first cause of action.

Plaintiff is directed to submit without delay proposed findings and judgment in accordance with this opinion.

Dated: Los Angeles, California, January 5, 1943.

BEN HARRISON,

Judge.

[Endorsed]: Filed Jan. 5, 1943. [23]

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for trial before the Court, sitting without a jury, at Los Angeles, California, on December 21, 1942. Plaintiff appeared by Leo V. Silverstein, United States Attorney for the Southern Division of California, Edward H. Mitchell and Edward J. O'Connor, Assistant United States Attorneys for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue. The defendants, The Estate of Olive Wills Wigmore and Philip Grey Smith, as Administrator of the Estate of Olive Wills Wigmore, Deceased, appeared by Burr & Smith, their attor-



neys. The defendant J. A. Wigmore, never having been served with process, made no appearance. Documentary evidence was introduced and thereafter the matter submitted to the Court upon briefs, and the Court having considered the evidence and the briefs submitted on behalf of the respective [24] parties, makes the following—

## FINDINGS OF FACT

### I.

That the plaintiff is a corporate and sovereign body politic.

### II.

That the defendants, The Estate of Olive Wills Wigmore, Deceased, and Philip Grey Smith, as Administrator with the will annexed of the Estate of Olive Wills Wigmore, Deceased, are and at all times herein mentioned have been residents of the State of California and of this judicial district.

### III.

That the commencement of the above-entitled action was requested and sanctioned by the United States Commissioner of Internal Revenue and was authorized by the Attorney General of the United States.

### IV.

That Olive Wills Wigmore died on March 1, 1941, a resident of the City of Pasadena, County of Los Angeles, State of California; that letters of administration of her estate were issued by the Probate Division of the Superior Court of the State of

California in and for the County of Los Angeles in the probate proceeding entitled "In the Matter of the Estate of Olive Wills Wigmore, Deceased, No. 203,316."

V.

That the defendant Philip Grey Smith is the duly appointed, qualified and acting Administrator with Will Annexed of the Estate of Olive Wills Wigmore.

VI.

That the decedent Olive Wills Wigmore and her husband, J. A. Wigmore, filed a joint Federal income tax return for the taxable year 1933 on March 13, 1934, disclosing no tax.

VII.

That thereafter, and on the 17th day of January, 1936, J. A. Wigmore and Olive Wills Wigmore signed a consent fixing the period of limitations on assessment of income and profits tax, which consent was in the words and figures following: [25]

"Consent Fixing Period of Limitations Upon  
Assessment of Income and Profits Tax

Cleveland, Ohio, January 17, 1936

"In pursuance of the provisions of existing Internal Revenue Laws J. A. Wigmore, a taxpayer (or taxpayers) of Chesterland, Coauga County, Ohio, and the Commissioner of Internal Revenue hereby consent and agree as follows:

"That the amount of any income, excess-profits, or war-profits taxes due under any re-

turn (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year (or years) 1933 under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1937, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

J. A. WIGMORE

Taxpayer

OLIVE W. WIGMORE

Taxpayer

By .....

[Seal]

GUY T. HELVERING

Commissioner of Internal  
Revenue

By A. C. C.

January 31, 1936

“If this consent is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other. \* \* \* ”

### VIII.

That on the 16th day of October, 1936, the Commissioner of Internal Revenue, on his October, 1936,

No. 3 Assessment List, page 1, line 7, for the Eighteenth Collection District of Ohio, assessed 1933 income taxes, together with interest thereon against said Olive Wills Wigmore and J. A. Wigmore, jointly, in the aggregate amount of \$2,981.27. [26]

### IX.

That no part of the Federal income taxes assessed against Olive Wills Wigmore and J. A. Wigmore, jointly, for the year 1933, or interest thereon, has been paid.

### X.

That on the 12th day of April, 1941, the Commissioner of Internal Revenue, on his March, 1941, Assessment List for the Eighteenth Collection District of Ohio, Account No. 202,878, assessed income taxes against Olive Wills Wigmore for the taxable year 1940 in the sum of \$2,321.89, of which tax there was paid the sum of \$580.48 on March 14, 1941, and that there now remains unpaid of said tax a balance of \$1,741.41, together with interest thereon as provided by law.

### XI.

That Olive W. Wigmore did not consent that the said income taxes for the taxable year 1933 <sup>e</sup>would be assessed on or before June 30, 1937, or at any time after the 15th day of March, 1936.

From the foregoing Findings of Fact, the Court draws the following—

## CONCLUSIONS OF LAW

### I.

That the consent or waiver of the statute of limitations signed by J. A. Wigmore and Olive W. Wigmore on January 17, 1936, was ineffective as to Olive Wills Wigmore and her estate and did not extend the time within which the Commissioner of Internal Revenue might assess income taxes against said Olive Wills Wigmore for the taxable year 1933.

### II.

That the Commissioner of Internal Revenue was barred by the applicable statute of limitations from making any assessment of income taxes against Olive Wills Wigmore after the 15th day of March, 1936.

### III.

That neither Olive Wills Wigmore, her estate nor the defendant, Philip Grey Smith, as Administrator with the Will Annexed of the Estate of Olive Wills [27] Wigmore, Deceased, is indebted to the plaintiff for any sum whatsoever on account of income taxes for the taxable year 1933.

### IV.

That the defendants, The Estate of Olive Wills Wigmore, Deceased, and Philip Grey Smith, as Administrator with the Will Annexed of the Estate of Olive Wills Wigmore, Deceased, are indebted to the plaintiff for the sum of \$1,741.41, together with interest provided by law, on account of the

unpaid income taxes of said Olive Wills Wigmore for the taxable year 1940.

V.

That the plaintiff is entitled to judgment against the defendants, The Estate of Olive Wills Wigmore, Deceased, and Philip Grey Smith, as Administrator with the Will Annexed of the Estate of Olive Wills Wigmore, Deceased, in the sum of \$1,741.41, together with interest thereon as provided by law, and for the plaintiff's costs to be taxed.

Dated: January 8, 1943.

BEN HARRISON

Judge.

Approved as to Form:

CLYDE R. BURR

Attorney for Defendants.

[Endorsed]: Filed Jan. 8, 1943. [28]

In the District Court of the United States in and  
for the Southern District of California  
Central Division

No. 2499-BH

UNITED STATES OF AMERICA, a corporate  
body politic,

Plaintiff,

v.

THE ESTATE OF OLIVE WILLS WIGMORE,  
DECEASED, PHILIP GREY SMITH, as  
Administrator with the will annexed of the  
Estate of OLIVE WILLS WIGMORE, De-  
ceased, and J. A. WIGMORE,

Defendants.

### JUDGMENT

The above-entitled case came on for trial before the Court, sitting without a jury, at Los Angeles, on the 21st day of December, 1942. Plaintiff appeared by Leo V. Silverstein, United States Attorney for the Southern Division of California, Edward H. Mitchell and Edward J. O'Connor, Assistant United States Attorneys for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue. The defendants, The Estate of Olive Wills Wigmore, Deceased, and Philip Grey Smith, as Administrator of the Estate of Olive Wills Wigmore, Deceased, appeared by Burr & Smith, their attorneys. The defendant J. A. Wigmore, never having been served with process, made no appear-

ance. Documentary evidence was introduced and thereafter the matter submitted to the Court upon briefs, and the Court having rendered its opinion and entered its findings of fact and conclusions of law— [29]

Now, Therefore, It Is Ordered and Adjudged that the plaintiff have and recover judgment against the defendants, The Estate of Olive Wills Wigmore, Deceased, and Philip Grey Smith, as Administrator with the Will Annexed of the Estate of Olive Wills Wigmore, Deceased, for the sum of \$1,741.41, principal, and \$156.64, interest up to January 8, 1943, aggregating the total amount of \$1,898.05, together with interest on the latter amount at the rate of 7% per annum from that date, on account of the unpaid income taxes of Olive Wills Wigmore for the taxable year 1940, and for plaintiff's costs, taxed in the sum of \$. . . . .

BEN HARRISON

Judge.

Approved as to Form:

CLYDE R. BURR

Attorney for Defendants.

Judgment entered Jan. 8, 1943. Docketed Jan. 8, 1943. Book C. O. # 13 Page 219. Edmund L. Smith, Clerk. By Murray E. Wire, Deputy.

[Endorsed]: Filed Jan. 8, 1943. [30]



[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice Is Hereby Given that the United States of America, the plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 8, 1943.

Dated: March 30, 1943.

LEO V. SILVERSTEIN,  
U. S. Attorney,  
E. H. MITCHELL,  
Asst. U. S. Attorney,  
EUGENE HARPOLE,  
Special Attorney,  
Bureau of Internal Revenue.

By EUGENE HARPOLE

Attorneys for Plaintiff.

[Endorsed]: Filed and Mailed Copy to Philip Grey Smith, Atty. for Defts. Mar. 31, 1943. Edmund L. Smith, Clerk. By John A. Childress, Deputy Clerk. [31]

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[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
PLAINTIFF INTENDS TO RELY UPON  
APPEAL.

The plaintiff, United States of America, designates the following as the points upon which it intends to rely upon appeal:

1. The District Court erred in its Finding of Fact numbered XI in that said Finding of Fact is not supported by the evidence before the Court and is contrary to the evidence before the Court and conflicts with the Court's Findings of Fact numbered VI and VII, which correctly embodied the evidence introduced. [32]

2. The District Court erred in its Conclusion of Law numbered I, for the reason that said Conclusion of Law is not supported by the Court's Findings of Fact and is repugnant to the Court's Findings of Fact numbered VI and VII.

3. The District Court erred in its Conclusion of Law numbered II for the reason that said Conclusion of Law is not supported by the Court's Findings of Fact and is repugnant to the Court's Findings of Fact numbered VI and VII.

4. The District Court erred in its Conclusion of Law numbered III for the reason that said Conclusion of Law is not supported by the Court's Findings of Fact and is repugnant to the Court's Findings of Fact numbered VI and VII.

5. The District Court erred in its Conclusions of Law numbered V for the reason that said Conclusion of Law is not supported by the Court's Findings of Fact and is repugnant to the Court's Findings of Fact numbered VI and VII.

6. The District Court erred in failing to conclude as a matter of law that the consent signed by Olive Wills Wigmore on the 17th day of January, 1936, and fully set forth in the Court's Finding of Fact numbered VII, was valid and binding upon

Olive Wills Wigmore and her estate and extended the time within which the Commissioner of Internal Revenue might assess income and excess profits taxes against her for the taxable year 1933 to and including June 30, 1937.

7. The District Court erred in entering Judgment in favor of the defendants and against the plaintiff for the reason that the evidence introduced and the Court's Findings of Fact numbered VI and VII require that as a matter of law Judgment should be entered for the plaintiff.

Dated: March 30, 1943.

LEO V. SILVERSTEIN,

U. S. Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

By EUGENE HARPOLE,

Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 31, 1943. [33]

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[Title of District Court and Cause.]

PLAINTIFF-APPELLANT'S DESIGNATION  
OF RECORD ON APPEAL.

The Appellant, the Plaintiff in the above entitled action, hereby designates the following portions of the record, proceedings and evidence to be contained

in the record on appeal in the above entitled action:

1. Complaint;
2. Answer;
3. Plaintiff's Exhibit 1, the 1933 income tax return of Olive Wills Wigmore;
4. Plaintiff's Exhibit 2, the waiver of Statute of Limitations; [34]
5. Plaintiff's Exhibit 3, the Commissioner's October No. 3, 1936 assessment list;
6. Opinion of District Court;
7. Findings of Fact and Conclusions of Law;
8. Judgment;
9. Notice of Appeal;
10. Statement of Points upon which plaintiff intends to rely upon appeal;
11. This designation;
12. Certificate of Clerk of the District Court.

Dated: March 30, 1943.

LEO V. SILVERSTEIN,

U. S. Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

By EUGENE HARPOLE,

Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 31, 1943. [35]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 35 inclusive contain full, true and correct copies of: Complaint; Answer of Philip Grey Smith, as Administrator etc.; Plaintiff's Exhibits Nos. 1, 2 and 3; Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points upon which Plaintiff Intends to Rely upon Appeal and Designation of Record on Appeal which constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 14 day of April, A. D., 1943.

[Seal]

EDMUND L. SMITH

Clerk

By THEODORE HOCKE

Deputy Clerk.

[Endorsed]: No. 10404. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Philip Grey Smith, as Administrator with will annexed of the Estate of Olive Wills Wigmore, Deceased, and J. A. Wigmore, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed April 15, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
For the Ninth Circuit

No. 10404

UNITED STATES OF AMERICA, A CORPORATE BODY POLITIC,

Plaintiff,

vs.

THE ESTATE OF OLIVE WILLS WIGMORE,  
PHILIP GREY SMITH, as Administrator  
with will annexed of the Estate of Olive Wills  
Wigmore, deceased, and J. A. WIGMORE.

Defendants.

APPELLANT'S STATEMENT OF POINTS TO  
BE URGED UPON APPEAL.

1. That the District Court erred in its Finding

of Fact numbered XI in that said Finding of Fact is not supported by the evidence before the Court and is contrary to the evidence before the Court and conflicts with the Court's Findings of Fact numbered VI and VII, which correctly embodied the evidence introduced.

2. That the District Court erred in its Conclusion of Law numbered I, for the reason that said Conclusion of Law is not supported by the Court's Findings of Fact and is repugnant to the Court's Findings of Fact numbered VI and VII.

3. That the District Court erred in its Conclusion of Law numbered II, for the reason that said Conclusion of Law is not supported by the Court's Findings of Fact and is repugnant to the Court's Findings of Fact numbered VI and VII.

4. That the District Court erred in its Conclusion of Law numbered III, for the reason that said Conclusion of Law is not supported by the Court's Findings of Fact and is repugnant to the Court's Findings of Fact numbered VI and VII.

5. That the District Court erred in its Conclusions of Law numbered V, for the reason that said Conclusion of Law is not supported by the Court's Findings of Fact and is repugnant to the Court's Findings of Fact numbered VI and VII.

6. That the District Court erred in failing to conclude as a matter of law that the consent signed by Olive Wills Wigmore on the 17th day of January, 1936, and fully set forth in the Court's Finding of Fact numbered VII, was valid and binding upon Olive Wills Wigmore and her estate and extended

the time within which the Commissioner of Internal Revenue might assess income and excess profits taxes against her for the taxable year 1933 to and including June 30, 1937.

7. That the District Court erred in entering Judgment in favor of the defendants and against the plaintiff for the reason that the evidence introduced and the Court's Findings of Fact numbered VI and VII require that as a matter of law Judgment should be entered for the plaintiff.

Dated: This 14th day of April, 1943.

LEO V. SILVERSTEIN,

U. S. Attorney,

E. H. MITCHELL,

Asst. U. S. Atty.,

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

By EUGENE HARPOLE

Attorneys for Appellant-  
Plaintiff

Received copy of the within Appellant's Statement of Points to be urged upon Appeal this 14th day of April, 1943.

CLYDE R. BURR

Attorney for Philip Grey  
Smith, Administrator

[Endorsed]: Filed Apr 15, 1943. Paul P. O'Brien,  
Clerk.